84-1454

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
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IN THE SUPREME COURT OF THE UNITED STATES

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NO. _____

MISSISSIPPI POWER & LIGHT COMPANY

Appellant

vs.

LOUIS A. CONERLY, ET AL

Appellees

ON APPEAL FROM THE
SUPREME COURT OF MISSISSIPPI

APPENDIX TO JURISDICTIONAL STATEMENT

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APPENDIX A

BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF MISSISSIPPI

U-4093	IN RE:	APPLICATION OF MISSISSIPPI POWER & LIGHT COMPANY, A CORPORATION ("APPLICANT"), FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO CONSTRUCT, OPERATE, AND MAINTAIN APPROXIMATELY FIFTY-ONE (51) MILES OF 500 KV TRANSMISSION LINE FROM APPLICANT'S FRANKLIN EHV SUBSTATION IN FRANKLIN COUNTY THROUGH PORTIONS OF LINCOLN AND PIKE COUNTIES TO A POINT IN SECTION 35, TOWNSHIP 1 NORTH, RANGE 11 EAST, WALTHALL COUNTY ON THE MISSISSIPPI-LOUISIANA STATE LINE, TOGETHER WITH OTHER NECESSARY RELATED EQUIPMENT ALL WITHIN FRANKLIN, LINCOLN, PIKE, AND WALTHALL COUNTIES, MISSISSIPPI
MISSISSIPPI POWER & LIGHT COMPANY ELECTRIC BUILDING JACKSON, MISSISSIPPI		

October 20, 1981

ORDER GRANTING CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

This cause coming on to be heard on the 13th day of October, 1981, at 10:00 o'clock a.m. in the offices of the Mississippi Public Service Commission on the Nineteenth Floor of the Sillers State Office Building, Jackson, Mississippi, on the Application of Mississippi Power & Light Company, hereinafter sometimes referred to as "Applicant," a corporation organized and existing under and by virtue of the laws of the State of Mississippi, for a Certificate that the present and future public convenience and necessity require, or will require, the construction, operation, and maintenance of certain electric facilities and equipment more particularly described in the Application filed in this cause, and hereinafter in this Order, all of which will be for the transmission and distribution of electricity for intrastate sale or sales

to and for the public for compensation; and

Applicant introduced evidence, both oral and documentary, in support of its Application, and the Commission having heard and considered the matter, and being fully advised in the premises, finds as follows, to-wit:

That the Application was filed with the Commission on September 14, 1981, by Applicant, and that said cause was returnable for hearing to the October docket call of the Commission to be held on October 6, 1981, and notice of said hearing was given to all persons interested therein by publication in The Clarion-Ledger on September 16, 1981, a newspaper of general circulation published in Jackson, Mississippi, and by mailing such notice by registered or certified mail to each public utility or person interested therein who may be affected by an Order resulting from said Application and a

hearing, said notices having been mailed as is required by law at least twenty (20) days prior to the hearing hereof, and having been in strict compliance with the law and having been in the judgment of the Commission such reasonable notice of said hearing to all interested persons as is necessary under the law and under the rules and regulations of the Commission; and

That on October 6, 1981, the date of the October docket call of the Commission, the Commission continued this matter and set it for hearing on October 13, 1981. Notice of said setting and hearing date was given to all interested persons as is necessary and as required under the law and under the rules and regulations of the Commission; and

That the Commission has jurisdiction of the parties and of the subject matter, and jurisdiction to do that hereunder done in manner and form as done; and

That no objections or protests to the granting of a Certificate to the Appellant herein have been filed, and that no protestants appeared at the hearing on said cause, and no objections have been made to the granting of this Order; and

That Applicant is a utility as defined in Section 1 D (1) of the Public Utilities Act of 1956, Chapter 372, Mississippi Laws of 1956, 12 amended (Section 77-3-1, et seq., Mississippi Code of 1972) (the "Act"). That as such the construction and operation of Applicant's facilities and extensions thereof fall under the purview of the Act. That a true and correct copy of Applicant's Restated Articles of Incorporation and amendments thereto are on file with the Commission in Cause U-3850, and a true and correct copy of the Articles of Merger whereunder Applicant succeeded to the rights, privileges, and properties of Mississippi Power & Light Company, a Florida corporation, is on file

with this Commission in Cause U-778, and both are hereby incorporated in the Application in this cause by reference.

That Applicant is and with its predecessor companies has for many years been engaged in its business as an electric public utility within Franklin, Lincoln, Pike, and Walthall Counties, Mississippi, where it maintains, and has for many years maintained, transmission lines, transformer stations, distribution lines, and other facilities and equipment used and useful in its business as an electric public utility. That on December 3, 1958, and November 25, 1959, this Commission granted unto Applicant's predecessor company in Cause U-44 Certificates of Public Convenience and Necessity to continue its facilities and operations substantially as applied for in said cause and indicated on the exhibits attached thereto, including the counties aforesaid, which Orders were made permanent by an Order of the

Commission in Docket U-44 dated September 3, 1968, as amended by an Order dated October 1, 1968, all of which Orders are incorporated in the Application in this cause by reference.

That Applicant proposes to construct approximately fifty-one (51) miles of single circuit, steel tower, 500 KV transmission line from Applicant's Franklin EHV substation located in Section 6, Township 6 North, Range 6 East, Franklin County, through portions of Lincoln and Pike Counties to a point in Section 35, Township 1 North, Range 11 East, Walthall County, on the Mississippi-Louisiana state line. That the line will be constructed with triple bundle 954 MCM ACSR conductors and with two shield wires. That there is attached to the Applicant in this cause and marked Exhibits "A" through "D" maps of Franklin, Lincoln, Pike, and Walthall Counties, showing thereon Applicant's existing facilities, certificated service

areas, and the location of the proposed transmission line. That as shown thereon, portions of the proposed transmission will be constructed within areas which are not certificated to Applicant, but that Applicant does not seek any additions to its service areas by virtue of this Application and construction and operation of the proposed transmission line. That Applicant proposes to construct such other necessary related equipment as may be necessary for the construction and operation of the aforesaid transmission line.

That the proposed new 500 KV transmission line will be a part of an interconnection with Louisiana Power & Light Company which will result in a 500 KV transmission line from Applicant's Franklin EHV substation to a point near Bogalusa, Louisiana. That the proposed transmission line will provide a source for a 500/230 KV substation to be built by Louisiana Power & Light Company near

Bogalusa, Louisiana. That this 500/230 KV substation will provide a firm source of power to the southern portion of Applicant's certificated service area, unload the Franklin EHV substation transformers in Franklin County, and further unload the 115 KV transmission lines from Applicant's Franklin EHV substation. That the construction of the proposed new 500 KV transmission line by Applicant will solve certain overloading and low-voltage problems associated with contingencies in the southern part of Applicant's service area (such as the loss of Franklin EHV substation transformers or loss of Applicant's Brookhaven-McComb 115 KV transmission line.) That the proposed Bogalusa 500/230 KV substation will eliminate the need for Applicant to increase the transformer capacity at its Franklin EHV substation and the need by Applicant to build additional 115 KV transmission lines from

its Franklin EHV substation to McComb, Mississippi, by the late 1980s.

That the proposed new 500 KV transmission line will ultimately be extended by Louisiana Power & Light Company to the eastern part of New Orleans. That this will increase the power transfer capability between Applicant and south Louisiana and provide increased reliability to Applicant's Franklin EHV substation.

That Applicant's present estimate indicates that the cost of the proposed transmission line will be $25,400,000.00. That construction of the project will begin immediately and present estimates indicate that the line is expected to be completed in 1985.

That there is presently on file with the Commission a financial statement of Applicant which indicates that it is financially able at the present time to undertake the aforesaid construction.

That Applicant will secure funds for said construction from cash generated through operation and from the sale of notes and/or other securities of Applicant as may be appropriate in the light of Applicant's position and the then current market conditions.

Certain locations as shown on the exhibits to the Application in this cause for the construction of the facilities requested herein are approximate, and the actual location of said transmission line will depend upon the ground surveys and right-of-way acquisitions in the future, considering terrain, accessibility, and the nature of the area. This project is hereby approved, together with the necessary right-of-way and land acquisition, with the exact location of the same to be determined as above stated.

Likewise, the estimates of the project cost and completion date are present estimates based on available information

and are subject to change due to unforeseeable circumstances. This project is hereby approved and a certificate granted with exact cost and completion date being subject to change as above stated.

Applicant is not, by virtue of the aforesaid construction and this Order, granted any additions to its service area and does not, by reason of this proposed construction, acquire the right to serve any consumers that it would not otherwise be entitled to serve.

The only other suppliers of electric energy operating within the various areas which are the subject of the Application in this cause, or which might have an interest in the outcome of said Application, are Magnolia Electric Power Association, McComb, Mississippi; Southwest Mississippi Electric Power Association, Lorman, Mississippi; Southern Pine Electric Power Association, Taylorsville, Mississippi; Pearl River Valley Electric Power Association,

Columbia, Mississippi; and South Mississippi Electric Power Association, Hattiesburg, Mississippi.

Applicant is ready, willing, and able to conduct the construction applied for herein and to operate the same and to render adequate electric service to all persons and premises which it is legally entitled to serve. All of the facilities requested in the Application in this cause will be constructed in accordance with the National Electric Safety Code and good practices in the electric utility industry.

The present and future public convenience and necessity require, and will require, that Applicant be granted by the Commission a Certificate of Public Convenience and Necessity to acquire, extend, construct, operate, and maintain the facilities hereinabove described and applied for, together with the rights-of-way necessary and incidental thereto.

IT IS, THEREFORE, CONSIDERED BY THE COMMISSION, ORDERED, AND ADJUDGED on the hearing of said Application and all matters therein requested, that this Commission should, and by these presents, does hereby grant unto Mississippi Power & Light Company, a Mississippi corporation, the Applicant herein, its successors and assigns, a Certificate that the present and future public convenience and necessity require and will require that the Applicant acquire the necessary property, easements, and rights-of-way, and extend, acquire, construct, operate, and maintain the electric facilities herein particularly described and hereby applied for in its Application filed in this cause on September 14, 1981, and to operate the same for the transmission and distribution of electricity for intrastate sales to and for the public for compensation, as the same are fully described and applied for

in the Application and record of this cause and as fully described herein.

This Order shall be effective from and after the date of issuance.

The Commission retains jurisdiction of this matter for all purposes authorized by law.

ORDERED AND ADJUDGED on this, the 20th day of October, 1981.

/s/ E. W. Robinson

E. W. ROBINSON,
EXECUTIVE SECRETARY

cc: List on File

(SEAL)

APPENDIX B

IN THE CIRCUIT COURT OF
WALTHALL COUNTY, MISSISSIPPI

SPECIAL COURT OF EMINENT DOMAIN

Civil Action No. 3823

Mississippi Power & Light Company

Petitioner

v.

Jewell D. Thomas and Francis W. Thomas

Defendants

August 19, 1983

J U D G M E N T

In this civil action the claim of Petitioner, Mississippi Power & Light Company, a public corporation organized and existing under the laws of the State of Mississippi, to have condemned certain real property named in the Petition for Condemnation hereafter described, the fee simple title to said property being vested in Jewell D. Thomas and Francis W. Thomas, was submitted to a jury composed of Mrs.

Dan Alford, Janice Carson Butler, Cecile Davis, Douglas Dillon, Marcus Green, Odessa Magee Hopkins, Alton Magee, Juanita Magee, Elijah Ratliff, Jr., Kim Roberts, Rosemary Rushing and Gene Autry Smith, on the 17th day of August, 1983, and the jury returned a verdict in favor of Defendants Jewell D. Thomas and Francis W. Thomas, fixing said Defendants' due compensation in damages at Fifty-five Thousand Eight Hundred Eighty and 50/100 ($55,880.50) Dollars, and the verdict was received and filed.

Now, upon the payment of said award with legal interest from the date of the filing of the Petition for Condemnation, being June 8, 1983, by Mississippi Power & Light Company to said Defendants, or to the Circuit Clerk of Walthall County, Mississippi, for their use and benefit as provided by law and as herein ordered, Petitioner can enter upon and take possession of the hereinafter described

property and appropriate it to public use as prayed for in its Petition, which public use is hereinafter set forth, said lands being all situated in Walthall County, Mississippi, and being particularly described as follows, to-wit:

> Commencing at the Northwest corner of the E 1/2 of SE 1/4 of the SW 1/4 of Section 27, Township 1 North, Range 11 East, Walthall County, Mississippi; run thence South 8.4 feet to a point on the Jewell D. Thomas west property line and Point of Beginning of the right-of-way herein described; from said Point of Beginning run thence south a distance of 129.0 feet to a point on the centerline of Mississippi Power & Light Company's Franklin-Bogalusa 500 KV transmission line, thence continue south 129.0 feet to a point on the south right-of-way line of said transmission line, thence run South 51°36'13" East a distance of 7639.0 feet to a point on the Jewell D. Thomas east property line (said point being 1,515.6 feet, more or less, north of the southeast corner of the SE1/4 of the SW1/4 of Section 35, Township 1 North, Range 11 East, Walthall County, Mississippi); thence run north along the said east property line fence a distance of 129.0 feet to a point on the centerline of said Mississippi Power & Light Company electric transmission line, thence continue north 129.0 feet to the north right-of-way line of said transmission line, thence run North 51°36'13" West along said north right-

of-way line a distance of 7639.0 feet to the Point of Beginning located on the Jewell D. Thomas west property line; containing 35.07 acres, more or less, less and except any part of the above described area lying within the limits of existing county road right-of-way.

The use and purpose for which the property above described is taken is for a right-of-way and easement with all the privileges and rights of enjoyment and use thereof accorded and given under the laws of the State of Mississippi, including the following rights and subject to the following limitations:

For the location, construction, reconstruction, operation, maintenance and removal of an electric circuit or circuits, including towers, poles, crossarms, insulators, wires, hardware, switches and all other equipment, structures, material and appliances now or hereafter used, useful or desired in connection therewith, over, across, under and on that land herein described. Included in this

right-of-way and easement, Petition shall have the full right, without payment of further compensation, of ingress and egress across Defendants' property to said right-of-way, to clear and keep clear said right-of-way, including the right to cut down, burn, condition, treat or otherwise, remove all trees, timber, undergrowth and other obstructions. Petitioner shall have the full right, without payment of further compensation, to cut down all trees that are tall enough to strike the wires when falling, where located beyond the limits of the said right-of-way, such trees being known as "danger trees." Petitioner shall have the further right to cut down, from time to time, danger trees located beyond the limits of the said right-of-way, provided Petitioner shall pay Jewell D. Thomas and Francis W. Thomas, or their successors in title, the reasonable market value of such trees at the time of cutting, but only when such cutting occurs after

the initial construction as above set forth. In addition thereto, Jewell D. Thomas and Francis W. Thomas, or their successors in title, shall have the right to use the land in question for agricultural or other purposes as long as said purposes do not interfere with the rights herein created in Petitioner, and Petitioner retains the right to clear, cut down or destroy any crops on said Petitioner's right-of-way, if necessary, but Petitioner will pay to Jewell D. Thomas and Francis W. Thomas, or their successors in title, the reasonable market value of said agricultural crop at the time of the said clearing or cutting, but only when such clearing or cutting occurs after the initial construction, as above set forth.

Petitioner also requires such title that there will not be constructed, or permitted to be constructed, any house, barn, well, lake or other structure or hazard on said right-of-way.

Jewell D. Thomas and Francis W. Thomas, or their successors in title, shall have, at all times, the right to use the said right-of-way for any lawful purposes, provided it does not interfere with the rights herein created in Petitioner, and Petitioner will not enclose said right-of-way.

A certified copy of this judgment shall be filed, recorded and indexed, in the same manner as a land deed, upon the land records on file in the office of the Chancery Clerk of Walthall County, Mississippi.

Let the Petitioner pay the costs, for which execution may issue.

ORDERED AND ADJUDGED, on this the 19th day of August, 1983.

/s/ Joe N. Pigott
CIRCUIT JUDGE

APPENDIX C

IN THE SPECIAL COURT OF EMINENT DOMAIN OF

WALTHALL COUNTY, MISSISSIPPI

Civil Action No. 3844
Civil Action No. 3843
Civil Action No. 3845
Civil Action No. 3846

Mississippi Power & Light Company

v.

Louis A. Conerly, et al

February 3, 1984

ORDER ON MOTIONS TO DISMISS

These causes having been consolidated for hearing of Motions filed by the Landowners and came on for hearing on Motions to Dismiss the Eminent Domain Proceedings brought by Mississippi Power & Light Co. (M.P.& L.Co.) for the taking of a right of way across lands of the Moveants for the construction of a 500 KV electric transmission line from Petitioner's Franklin

EHV Sub-station in Franklin County, Mississippi, to the Louisiana state line to there connect with Louisiana Power & Light Co.

It is conceded that no Mississippi customer would be served off of the transmission line in question and that the line would be used solely to transmit electric current from the Franklin EHV Sub-station to Louisiana Power & Light Co. It is admitted that the Mississippi Public Service Commission will not have jurisdiction to establish or approve rates for sale of electricity interstate to Louisiana Power & Light Co.

The Court must first determine whether it has jurisdiction and authority to conduct eminent domain proceedings (Section 11-27-15 Code of 1972). Petitioner is proceeding under Section 11-27-47 which provides in part that such companies "are hereby empowered to exercise the right of eminent domain in the manner now provided by law." Section 17 of the Mississippi

Constitution of 1890 provides in part that "the question whether the contemplated use be public shall be a judicial question, and as such, determined without regard to legislative assertion that the use is public" . . .

Section 77-3-14 of Code of 1972 provides that a certificate of public convenience and necessity is required before beginning construction of any facility for the generation and transmission of electricity to be directly or indirectly used for the furnishing of public utility service in this state. In Miss. Power & Light Co. vs. Blake, 236 Miss. 207, 109 So.2d 657-661 it was held that public utilities are required to obtain a Certificate of Public Convenience and Necessity from the Mississippi Public Service Commission as a condition precedent to the exercise of the right of eminent domain.

> Section 77-3-67 provides that The order shall not be vacated or set aside either in whole or part, except for errors of law, unless the court finds that the order of the Commission is not supported by substantial evidence, is contrary to the manifest weight of evidence, is in excess of the statutory authority or jurisdiction of the Commission, or violated constitutional rights.

In the legislative delegation of authority and jurisdiction to the Mississippi Public Service Commission Section 77-3-5 Code of 1972 provides "Subject to the limitations imposed in this article and in accordance with the provisions hereof, the public service commission shall have exclusive original jurisdiction over the intrastate business and property of public utilities. . ."

The primary stated purpose of the proposed 500 KV line is to transmit electrical energy from Franklin County, Mississippi, to the Louisiana Power & Light Co. in the State of Louisiana near Bogalusa, Louisiana, ultimately to be extended by Louisiana Power & Light to the eastern

part of New Orleans, Louisiana. Not one Mississippi customer is to be served by the proposed transmission line. The rates to be charged for electric power transmitted by the line will not be within the jurisdiction of the Mississippi Public Service Commission but will be fixed by the Federal Energy Regulatory Commission.

The authority of the Mississippi Public Service Commission to regulate rates is limited by the express language of the statute (Section 77-3-5) to intrastate business. The sale of electric power from Mississippi Power & Light Co. to the Louisiana Power & Light Co. is an interstate sale. (see Texas Gas Transmission Corp. vs. Miss. Public Service Comm. 133 So.2d 526 (1961) and United Gas Pipeline Corp. vs. Mississippi Public Service Commission 133 So.2d 521 (1961).

In the case at bar it is not a question as to the desireability, feasibility or practicallity of the electric power

line; but whether or not under the law Mississippi Power & Light Co. have the right to take from the landowners their land or rights of way for the use of Mississippi Power & Light Co. and Louisiana Power & Light Co. The sale of electric power by M.P.&.L Co. to La P.& L.Co. may indirectly cause an economic benefit to the customers of Mississippi Power & Light Co; but the sale is an interstate sale; the construction of the line is solely for interstate for business. The granting of the certificate of public convenience and necessity exceeded the statutory authority and jurisdiction of the Mississippi Public Service Commission and violated constitutional rights provided in Section 17 of the Mississippi Constitution.

It is therefore ordered and adjudged that the Motions to Dismiss the Petitions for Eminent Domain should be and are hereby sustained and the Petitions are

hereby dismissed at the costs of the Petitioner.

ORDERED AND ADJUDGED this the 3rd day of February, 1984.

/s/ Joe N. Pigott
CIRCUIT JUDGE AND JUDGE OF
THE SPECIAL COURT OF
EMINENT DOMAIN

APPENDIX D

IN THE SUPREME COURT OF MISSISSIPPI

NO. 55,641

Mississippi Power & Light Company

Plaintiff-Appellant,

v.

Louis A. Conerly, et al

Defendants-Appellees,

October 10, 1984

Before BOWLING, HAWKINS AND SULLIVAN

BOWLING, JUSTICE, FOR THE COURT:

This appeal involves proceedings in a Special Court of Eminent Domain of Walthall County, Mississippi, Circuit Judge Joe N.

Pigott presiding, according to applicable eminent domain statutes. Appellant, Mississippi Power & Light Company (MP&L) appeals from an order of the circuit judge dismissing its petitions for condemnation of land attempted to be secured for construction of a high voltage electric transmission line. The appeal brings four consolidated condemnation suits and involves four separate pieces of property owned by appellees. The principle issue is whether or not the trial judge had sufficient basis to dismiss the condemnation petitions. We hold that he did and we affirm his orders.

In 1981 appellant MP&L decided to construct a 500 kilovolt (Kv) transmission line from its substation in Franklin County, Mississippi, known as the "Franklin Substation" to a point on the Mississippi-Louisiana line. The Louisiana Power & Light Company (LP&L) was then to continue the high voltage line to

Bogalusa, Louisiana and eventually to the Eastern New Orleans electrical distribution point solely owned and operated by LP&L. Already constructed is a 500 Kv line from the new Grand Gulf nuclear energy plant in Mississippi to the Franklin Substation. The proposed new line of fifty-one miles from that station to the Louisiana line would continue the high power line so that it would carry electricity from the Grand Gulf plant into Bogalusa and from there, eventually, to New Orleans.

Prior to the attempt to secure the right of way for the fifty-one mile high voltage line, MP&L applied for a certificate of public convenience and necessity from the Mississippi Public Service Commission (MPSC), as required by the provisions of Mississippi Code Annotated, Section 77-3-14, which reads as follows:

> (1) Notwithstanding the provisions of section 77-3-11 and section 77-3-13, no public utility or other

person shall begin the construction of any facility for the generation and transmission of electricity to be directly or indirectly used for the furnishing of public utility service in this state, even though the facility be for furnishing the service already being rendered, without first obtaining from the commission a certificate that the public convenience and necessity requires, or will require, such construction.

(2) The commission shall develop, publicize and keep current an analysis of the long-range needs for expansion of facilities for the generation of electricity in Mississippi, including its estimate of the probable future growth of the use of electricity, the probable needed generation reserves, the extent, size, mix and general location of generating plants and arrangements for pooling power to the extent not regulated by the federal energy regulatory commission and other arrangements with other utilities and energy suppliers to achieve maximum efficiencies for the benefit of the people of Mississippi, and shall consider such analysis in acting upon any petition by any utility for construction. Each public utility engaged in the generation, transmission and distribution of electric energy shall, upon request of the commission, submit to the commission its forecasts and plans for the addition of generating capacity planned by the utility for an ensuing five-year period and shall furnish to the commission such documents and proof with respect to the need therefor as the commission may reasonably require.

In considering these analyses and forecasts, the commission shall consult with the board of economic development, the research and development center, the utilities commissions or comparable agencies of neighboring states, the federal energy regulatory commission and other agencies having relevant information and/or duties and responsibilities in this area, and particularly with the Mississippi Energy and Transportation Board with reference to the accomplishment of the Mississippi energy and transportation plan provided for in section 57-39-11.

(3) In acting upon any petition for the construction of any facility for the generation of electricity, the commission shall take into account the utility's arrangements with other electric utilities for interchange of power, pooling of plant, purchase of power and other methods of providing reliable, efficient and economical electric service.

(4) As a condition for receiving such certificate, the utility shall file an estimate of construction costs in such detail as the commission may require. The commission shall hold a public hearing on each application, and no certificate shall be granted unless the commission has approved the estimated construction costs.

(5) The commission shall maintain an ongoing review of such construction as it proceeds, and the applicant shall submit at such times

> as the commission shall require during construction a progress report and any revisions in the cost estimates for the construction.

On October 20, 1981, the MPSC issued its "Order Granting Certificate of Public Convenience and Necessity." Pursuant to this permission, appellant MP&L proceeded to acquire the right-of-way for the fifty-one mile high voltage line. Under this procedure, set up by the legislature, everything would have gone smoothly had all affected landowners and MP&L agreed on the sale and purchase of the right-of-way. This effort, however, was interfered with when the four sets of property owners involved in this appeal would not agree on a purchase and sale of their property for the electrical power line.

The next step in the cause was the filing by appellant MP&L of four petitions for condemnation in the Special Court of Eminent Domain, under the provisions of MCA § 11-27-2, et seq. (1972). The

particular section granting MP&L authority to file the condemnation proceedings is MCA § 11-27-47, which gives eminent domain rights to all companies

> . . . organized for the purpose of building or constructing pipelines and appliances for the conveying and distribution of oil or gas or for the purpose of constructing, maintaining and operating lines for transmitting electricity for lighting, heating and power purposes, or for the purpose of constructing, maintaining and operating lines and appliances for storing, transmitting and distributing water and for transmitting, treating and disposing of sewage, are hereby empowered to exercise the right of eminent domain. . . .

The condemnation petitions all had attached thereto as an exhibit, and made a part of the petition, the hereinbefore mentioned order of the MPSC.

The appellees filed their motions to dismiss the condemnation proceedings under the provisions of MCA § 11-27-15, which provides in part as follows:

> Any defendant may, not less than five (5) days prior to the date fixed for the hearing of the petition and

> in the same court where the petition is pending, file a motion to dismiss the petition on any of the following grounds: (1) that the petitioner seeking to exercise the right of eminent domain is not, in character, such a corporation, association, district or other legal entity as is entitled to the right; (2) that there is no public necessity for the taking of the particular property or a part thereof which it is proposed to condemn; or (3) that the contemplated use alleged to be a public use is not in law a public use for which private property may be taken or damaged. Any such motion, if filed, shall be heard and decided by the judge as a preference proceeding, without a jury, prior to the hearing on the petition.

In addition to the above set out statutory grounds for dismissal of the condemnation petitions, appellees contended that the real purpose for the construction of the high voltage line was for interconnection of the corporate utility entities owned solely by Middle South Utility System. These entities are MP&L, LP&L, Arkansas Power & Light (AP&L) and New Orleans Public Service, Inc. (NOPSI). Appellees alleged that this proposed construction was not an intrastate operation subject to

being under the jurisdiction of the MPSC. The petitions for dismissal contended that the scheme for constructing the high voltage line was to carry electricity interstate from Grand Gulf Generating Plant to LP&L facilities. Appellees contend that the allegation by appellant of incidental benefit to MP&L customers is a masquerade to justify constructing the interconnecting high power line. Appellees contend that the line was not for public use or public necessity as those terms apply to the utility and its consumers in the State of Mississippi. Contention is made by appellees that the purpose of the line is "interstate" rather than "intrastate", as was stated in the MPSC order attached and made a part of the condemnation proceedings.

After an evidentiary hearing consisting of testimony from the director of engineering office of appellant, interrogatories and answers thereto,

requests for admissions, stipulations and documents, such as corporate minutes, the circuit judge heading the Special Eminent Domain Court dismissed all four condemnation proceedings and the condemnor MP&L appeals here as a preference case.

The order dismissing appellant's petitions recites what we hereinafter shall discuss as material findings of fact. Unlike other judicial proceedings, the Special Court of Eminent Domain results in the circuit judge [in counties where there is no county court] being the finder of facts in determining whether or not the condemnation petitions should be dismissed under the hereinbefore quoted MCA § 11-27-15 (1972).

The lower court's order in its finding of facts on material issues, found:

> It is conceded that no Mississippi customer would be served off of the transmission line in question and that the line would be used solely to transmit electric current from the Franklin EHV sub-station to Louisiana Power & Light Co. It is admitted

that the Mississippi Public Service Commission will not have jurisdiction to establish or approve rates for sale of electricity interstate to Louisiana Power & Light Co.

Petitioner is proceeding under MCA § 11-27-47 (1972), which provides, in part, that such companies are hereby empowered to exercise the right of eminent domain. Mississippi Constitution, Article 3, Section 17 (1890) provides in part that: "The question whether the contemplated use be public shall be a judicial question and as such, determined without regard to legislative assertions that the use it public...." The legislative delegation of authority and jurisdiction to the Mississippi Public Service Commission, Section 77-3-5 Code of 1972, provides:

> Subject to the limitation imposed in this article and in accordance with the provisions hereof, the public service commission shall have exclusive original jurisdiction over the intrastate business and property of public utilities.

The primary stated purpose of the proposed 500 Kv line is to transmit electrical energy from Franklin County, Mississippi, to Louisiana Power & Light Company in the State of Louisiana, near Bogalusa, Louisiana, and ultimately to be extended by LP&L to the eastern part of New Orleans, Louisiana. Not one Mississippi customer is to be served by the proposed transmission line. The rates to be charged for electrical power transmitted by the line will not be within

> the jurisdiction of the Mississippi Public Service Commission, but will be fixed by the Federal Energy Regulatory Commission.

The order further states:

> The authority of the Mississippi Public Service Commission to regulate rates is limited by the express language of the statute (Section 77-3-5) to intrastate business. The sale of electric power from Mississippi Power & Light Co. to the Louisiana Power & Light Co. is an interstate sale.

Appellant contends that the judicially composed Special Eminent Domain Court was obligated to follow the MPSC's order authorizing the construction of the "intrastate line." Appellant further contends that under the applicable statute, MCA § 77-3-67 (1972), appellees were barred from securing a dismissal of the condemnation proceedings as they did not within thirty days of the MPSC's original order, appeal that order to the Chancery Court of Hinds County. The disposal of this argument is easy. MCA § 77-3-47 (1972), providing for notice of the commission's hearing such matters as that

requested by appellant states that "notice of all such hearings shall be given the persons interested therein by mailing such notice to each public utility which may be affected by any order resulting therefrom and by publication in a newspaper of general circulation published in Jackson, Mississippi." Admittedly, appellee landowners in Walthall County received no notice of the "hearing" before the MPSC, had no actual notice and therefore certainly would not know to appeal any such order within thirty days to the Chancery Court of Hinds County. It does not take a constitutional scholar to find that the requiring of these appellees to appeal an order affecting them and about which they had absolutely no notice or knowledge, is contrary to the due process requirements of either the state or federal constitutions. See Schroeder v. New York, 371 U.S. 208, 9 L.Ed.2d 255, 83 S.Ct. 279

(1962); and Walker v. Hutchinson, 352 U.S. 112, 1 L.Ed.2d 178, 77 S.Ct. 200 (1956).

The first notice received by appellees was the summons from the Special Court of Eminent Domain brought about by appellant filing its petitions for condemnation.

Before going further, we need to note the provisions of Mississippi Constitution, Article 3, Section 17 (1890), as follows:

> Private property shall not be taken or damages for public use, except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be a judicial question and, as such, determined without regard to legislative assertion that the use is public.

Obviously, in obedience to the above quoted constitutional provision, the legislature in 1971 enacted the hereinbefore set out MCA § 11-27-15 (1972), which affirmatively gave the

Special Court of Eminent Domain the power to dismiss the condemnation petitions for certain reasons, particularly, if the court found that there was "no public necessity" for the taking or that the "use alleged to be a public use is not in law a public use for which private property may be taken or damaged."

The MPSC is an arm of the legislature and understandably and properly oversees the actions of the utility companies in order to safeguard the rights of the people of this State. It certainly is commendable to require that the MPSC give its permission to the utility company before the latter proceeds to build its lines. The MPSC however only has jurisdiction within the State of Mississippi in such matters, and consequently, has the duty to control and regulate "intrastate" utility activities. The ballgame was switched to a different field when appellant filed its condemnation proceedings in the judicial

Special Eminent Domain Court. Even though appellant in its request is relying on the previous MPSC order, appellant admits that it is a prerogative of the eminent domain court judge to evaluate facts in deciding whether he should legally dismiss the condemnation proceedings.

As the proceedings have reached judicial proportions, there are certain elemental principles involved. Among them being, as said by this Court in Wise v. Yazoo City, 96 Miss. 507, 51 So. 453 (1910):

> "No power conferred on any corporation, either private or municipal, is to be more strictly construed than the power to exercise the right of eminent domain." . . ."The power of eminent domain being in derogation of the common right, acts conferring it are to be strictly construed, and are not to be extended beyond their plain provisions. The right to exercise the power is strictly limited to the purposes specified in the statute conferring it. The proposed use of the lands of the owner must be clearly embraced within the legitimate object of the power conferred. Where there is any doubt in regard to the extent of the power, the landowner must have the benefit of that doubt."

This Court recently has held that it is a general rule of statutory construction that where there is doubt of the right to exercise the power of eminent domain, the statutes will be strictly construed most favorable to the land owner. Roberts v. Mississippi State Highway Commission, 309 So.3d 56 (1975); Barry v. Southern Pine Electrical Power Association, 22 Miss. 260, 76 So.2d 412 (1954); and Fergusson v. Board of Supervisors, 149 Miss. 623, 115 So. 779 (1928).

We need now to look at the facts before the fact finder, Judge Pigott, at the time he sustained appellee's motion to dismiss.

The origination of the high voltage line in Mississippi is shown in the minutes of the operating committee of Middle South Utilities System. Portions of these minutes are as follows:

> The recognition of the necessity of increasing the Middle South System transmission capacity between the

south and the north based on the System Planning Committee reports of September 3, 1980 and December 3, 1980, the Operating Committee unanimously adopted the Planning Committee recommendations which are listed as follows:

1. The proper northern termination of a 500 Kv line from the East Orleans Energy Center is the Franklin 500 Kv switchyard of MP&L. Further, the bus at Franklin should not be split.

2. A switching station with a 500/230 Kv autotransformer should be constructed at Bogalusa.

3. The generating units at the East Orleans Energy Center should be connected directly to the 230 Kv system rather than directly to the 500 Kv system.

The Operating Committee recognizes that in addition to providing the necessary capability, the major advantage of the eastern route is its geographic separation from the existing Middle South System south-north transmission. The proposed line minimizes the probability of simultaneous transmission outages caused by natural disasters. Additionally, this route will provide strengthening of the transmission system in the Bogalusa and southern MP&L areas.

Attached to the minutes is the following statement in regard to the line in question:

PURPOSE AND NECESSITY

Middle South System studies have shown the need for a 500 Kv line to the Eastern part of New Orleans. The Franklin EHV Substation was found to be the proper northern terminal of that line. This authorization is for the Miss. Power & Light Company portion of the Franklin - East New Orleans and southern MSU System and will be a part of the transmission needed to distribute power from the East Orleans Energy Center. This line will also provide a source for LP&L's 500/230 KV Substation planned at Bogalusa, LA. This 500/230 KV substation will provide a firm source of power to the South MP&L area, unload the Franklin transformers and the 115 KV transmission from the Franklin EHV Substation, and solves overloading and low voltage problems associated with contingencies in the southern part of MP&L's service area (such as loss of Franklin transformers or loss of Brookhaven-McComb 115 Kv line). The Bogalusa Substation will eliminate the need to increase the transformer capacity at Franklin and to build additional 115 KV transmission from Franklin to McComb by the late 1980's;

1.	Franklin to LA state line 500 Kv line	$23,650,000	1984
2.	Franklin Line Bay	1,750,000	1984
	TOTAL	$25,400,000	

The eminent domain court judge also had before him the testimony of Frank F.

Gallaher, Jr., chief engineer for Appellant, whose testimony briefly explained that the primary purpose of the line was to convey electricity interstate to Louisiana but that it would be "stepped-down" at Bogalusa, Louisiana, and in the event it is needed in the future, it would be re-routed and no doubt re-bought by MP&L through 115 Kv lines now in existence between the two stations and would thereby benefit the counties in appellant's Mississippi territory near Louisiana.

The MPSC by statute admittedly had the duty to protect the interests of the utility and the consumer by holding that the 51 mile high voltage line in question was intrastate business, even though not one Mississippi consumer will receive electricity directly from the line. The cost of the 51 mile line in the sum of approximately $25,000,000 would be borne by the rate payers of Mississippi. This money paid for the line would then be

added to the rate base at the utilities next rate increase request and therefore added to the bills sent Mississippi consumers.

The record does not reveal testimony of any sale agreement to MP&L by its sister company, Middle South Energy, Inc., the owner of Grand Gulf Generating Plant, both of whom are completely owned by Middle South Utilities, Inc. The record does show that by agreement appellant, MP&L, LP&L and NOPSI will buy Middle South Energy's portion of the capacity of energy from the Grand Gulf Plant. The record does not reveal any details regarding the sale by MP&L to LP&L when it does cross the Mississippi/Louisiana line on the 500 Kv line in question. There is no revelation as to the manner or the means of sale of electricity that might return to Mississippi from Louisiana through the Bogalusa substation. We are forced to conclude in this area, the lower court had

ample reason to find that any future benefit of the line in question to Mississippi resident rate payers is highly speculative and something that might possibly materialize in the future.

The eminent domain court judge held that the granting of the certificate of public convenience and necessity exceeded the statutory authority and jurisdiction of the Mississippi Public Service Commission and violated constitutional rights provided in Mississippi Constitution Article 3, Section 17. The reasoning for this holding was the language in the opinion to the effect that the primary purpose of the 500 Kv line was to carry electricity interstate from Grand Gulf to Louisiana. The order of the MPSC stated that it was granting appellant's application "to operate the same for the transmission and distribution of electricity for intrastate sales to and for the public for compensation."

We already have discussed and quoted pertinent parts of Judge Pigott's dismissal order. It should be remembered that appellant made the order of the MPSC a part of its condemnation petitions. We cannot disagree with Judge Pigott that this part of the condemnation proceedings wherein the MPSC granted its permission for "intrastate sales" was not a valid order.

Reiterating -- Judge Pigott was in the seldom occurring situation of being the finder of facts when those facts are disputed or contradictory. We find that under the facts before him, Judge Pigott had ample reasons to find as a fact that "no Mississippi customer would be served off the transmission line in question." And . . . "the primary stated purpose of the proposed 500 KV line is to transmit electrical energy from Franklin County, Mississippi, to Louisiana Power & Light near Bogalusa, Louisiana, and ultimately

to be extended by LP&L to the eastern part of New Orleans, Louisiana. Not one Mississippi customer is to be served by the proposed transmission line."

The trial judge clearly found that the petition should be dismissed pursuant to the requirements of MCA § 11-27-15 (1972), in that there was no public necessity for the taking of the particular property or part thereof. The property was not being taken for "public use" and was not "in law a public use for which private property may be taken or damaged."

Even though Judge Pigott went further and held that MPSC erroneously labeled the line "interstate", the opinion still conforms to the requirements of § 11-27-15. We agree that MPSC was in error in making the line "intrastate" but we do not think that this holding was necessary for the disposition of the condemnation proceeding as was done by Judge Pigott. We agree with him that the terms "public necessity"

and "public use" as set out in the statutes that regulate the duties of the MPSC, contemplate use by the citizens of this state. This is true especially if these citizen rate payers are to pay $23,500,000 for a line and then have that amount added to their future rate base.

We find no error in the dismissal of the order of the Special Court of Eminent Domain and therefore affirm that court's action.

AFFIRMED.

WALKER AND ROY NOBLE LEE, P. JJ., AND HAWKINS, DAN LEE, PRATHER, ROBERTSON, AND SULLIVAN, JJ., CONCUR.
PATTERSON, C.J., NOT PARTICIPATING.

APPENDIX E

IN THE SUPREME COURT OF MISSISSIPPI

NO. 55,641

Mississippi Power & Light Company

Plaintiff-Appellant,

v.

Louis A. Conerly, et al

Defendants-Appellees,

December 12, 1984

This cause this day came on to be heard on Petition for Rehearing and this Court having sufficiently examined and considered the same en banc and being of the opinion that the same should be denied doth order that said Petition be and the

same is hereby Denied. The original opinion is modified.

APPENDIX F

IN THE SUPREME COURT OF MISSISSIPPI

NO. 55,641

Mississippi Power & Light Company

Plaintiff-Appellant,

v.

Louis A. Conerly, et al

Defendants-Appellees,

December 12, 1984

Before BOWLING, HAWKINS AND SULLIVAN

BOWLING, JUSTICE, FOR THE COURT:

This appeal involves proceedings in a Special Court of Eminent Domain of Walthall County, Mississippi, Circuit Judge Joe N.

Pigott presiding, according to applicable eminent domain statutes. Appellant, Mississippi Power & Light Company (MP&L) appeals from an order of the circuit judge dismissing its petitions for condemnation of land attempted to be secured for construction of a high voltage electric transmission line. The appeal brings four consolidated condemnation suits and involves four separate pieces of property owned by appellees. The principle issue is whether or not the trial judge had sufficient basis to dismiss the condemnation petitions. We hold that he did and we affirm his orders.

In 1981 appellant MP&L decided to construct a 500 kilovolt (Kv) transmission line from its substation in Franklin County, Mississippi, known as the "Franklin Substation" to a point on the Mississippi-Louisiana line. The Louisiana Power & Light Company (LP&L) was then to continue the high voltage line to Bogalusa,

Louisiana and eventually to the Eastern New Orleans electrical distribution point solely owned and operated by LP&L. Already constructed is a 500 Kv line from the new Grand Gulf nuclear energy plant in Mississippi to the Franklin Substation. The proposed new line of fifty-one miles from that station to the Louisiana line would continue the high power line so that it would carry electricity from the Grand Gulf plant into Bogalusa and from there, eventually, to New Orleans.

Prior to the attempt to secure the right of way for the fifty-one mile high voltage line, MP&L applied for a certificate of public convenience and necessity from the Mississippi Public Service Commission (MPSC), as required by the provisions of Mississippi Code Annotated, Section 77-3-11, which reads as follows:

> (1) No person shall construct, acquire, extend or operate equipment for manufacture, mixing, generating, transmitting or distributing natural or manufactured gas, or mixed gas, or

> electricity, or water, for any intrastate sale to or for the public for compensation, or for the operation of a public utility operating a business and equipment or facilities as contemplated by subparagraph (3) of paragraph (d) of section 77-3-3, without first having obtained from the commission a certificate that the present or future public convenience and necessity require or will require the operation of such equipment or facility.

On October 20, 1981, the MPSC issued its "Order Granting Certificate of Public Convenience and Necessity." Pursuant to this permission, appellant MP&L proceeded to acquire the right-of-way for the fifty-one mile high voltage line. Under this procedure, set up by the legislature, everything would have gone smoothly had all affected landowners and MP&L agreed on the sale and purchase of the right-of-way. This effort, however, was interfered with when the four sets of property owners involved in this appeal would not agree on a purchase and sale of their property for the electrical power line.

The next step in the cause was the filing by appellant MP&L of four petitions for condemnation in the Special Court of Eminent Domain, under the provisions of MCA § 11-27-2, et seq. (1972). The particular section granting MP&L authority to file the condemnation proceedings is MCA § 11-27-47, which gives eminent domain rights to all companies

> . . . organized for the purpose of building or constructing pipelines and appliances for the conveying and distribution of oil or gas or for the purpose of constructing, maintaining and operating lines for transmitting electricity for lighting, heating and power purposes, or for the purpose of constructing, maintaining and operating lines and appliances for storing, transmitting and distributing water and for transmitting, treating and disposing of sewage, are hereby empowered to exercise the right of eminent domain. . . .

The condemnation petitions all had attached thereto as an exhibit, and made a part of the petition, the hereinbefore mentioned order of the MPSC.

The appellees filed their motions to dismiss the condemnation proceedings under the provisions of MCA § 11-27-15, which provides in part as follows:

> Any defendant may, not less than five (5) days prior to the date fixed for the hearing of the petition and in the same court where the petition is pending, file a motion to dismiss the petition on any of the following grounds: (1) that the petitioner seeking to exercise the right of eminent domain is not, in character, such a corporation, association, district or other legal entity as is entitled to the right; (2) that there is no public necessity for the taking of the particular property or a part thereof which it is proposed to condemn; or (3) that the contemplated use alleged to be a public use is not in law a public use for which private property may be taken or damaged. Any such motion, if filed, shall be heard and decided by the judge as a preference proceeding, without a jury, prior to the hearing on the petition.

In addition to the above set out statutory grounds for dismissal of the condemnation petitions, appellees contended that the real purpose for the construction of the high voltage line was for interconnection of the corporate utility entities owned

solely by Middle South Utility System. These entities are MP&L, LP&L, Arkansas Power & Light (AP&L) and New Orleans Public Service, Inc. (NOPSI). Appellees alleged that this proposed construction was not an intrastate operation subject to being under the jurisdiction of the MPSC. The petitions for dismissal contended that the scheme for constructing the high voltage line was to carry electricity interstate from Grand Gulf Generating Plant to LP&L facilities. Appellees contend that the allegation by appellant of incidental benefit to MP&L customers is a masquerade to justify constructing the interconnecting high power line. Appellees contend that the line was not for public use or public necessity as those terms apply to the utility and its consumers in the State of Mississippi. Contention is made by appellees that the purpose of the line is "interstate" rather than "intrastate", as was stated in the MPSC order attached and

made a part of the condemnation proceedings.

After an evidentiary hearing consisting of testimony from the director of engineering office of appellant, interrogatories and answers thereto, requests for admissions, stipulations and documents, such as corporate minutes, the circuit judge heading the Special Eminent Domain Court dismissed all four condemnation proceedings and the condemnor MP&L appeals here as a preference case.

The order dismissing appellant's petitions recites what we hereinafter shall discuss as material findings of fact. Unlike other judicial proceedings, the Special Court of Eminent Domain results in the circuit judge [in counties where there is no county court] being the finder of facts in determining whether or not the condemnation petitions should be dismissed under the hereinbefore quoted MCA § 11-27-15 (1972).

The lower court's order in its finding of facts on material issues, found:

> It is conceded that no Mississippi customer would be served off of the transmission line in question and that the line would be used solely to transmit electric current from the Franklin EHV sub-station to Louisiana Power & Light Co. It is admitted that the Mississippi Public Service Commission will not have jurisdiction to establish or approve rates for sale of electricity interstate to Louisiana Power & Light Co.
>
> Petitioner is proceeding under MCA § 11-27-47 (1972), which provides, in part, that such companies are hereby empowered to exercise the right of eminent domain. Mississippi Constitution, Article 3, Section 17 (1890) provides in part that: "The question whether the contemplated use be public shall be a judicial question and as such, determined without regard to legislative assertions that the use it public...." The legislative delegation of authority and jurisdiction to the Mississippi Public Service Commission, Section 77-3-5 Code of 1972, provides:
>
> > Subject to the limitation imposed in this article and in accordance with the provisions hereof, the public service commission shall have exclusive original jurisdiction over the <u>intrastate</u> business and <u>property</u> of public utilities.
>
> The primary stated purpose of the proposed 500 Kv line is to

> transmit electrical energy from Franklin County, Mississippi, to Louisiana Power & Light Company in the State of Louisiana, near Bogalusa, Louisiana, and ultimately to be extended by LP&L to the eastern part of New Orleans, Louisiana. Not one Mississippi customer is to be served by the proposed transmission line. The rates to be charged for electrical power transmitted by the line will not be within the jurisdiction of the Mississippi Public Service Commission, but will be fixed by the Federal Energy Regulatory Commission.

The order further states:

> The authority of the Mississippi Public Service Commission to regulate rates is limited by the express language of the statute (Section 77-3-5) to intrastate business. The sale of electric power from Mississippi Power & Light Co. to the Louisiana Power & Light Co. is an interstate sale.

Appellant contends that the judicially composed Special Eminent Domain Court was obligated to follow the MPSC's order authorizing the construction of the "intrastate line." Appellant further contends that under the applicable statute, MCA § 77-3-67 (1972), appellees were barred from securing a dismissal of the condemnation proceedings as they did not

within thirty days of the MPSC's original order, appeal that order to the Chancery Court of Hinds County. The disposal of this argument is easy. MCA § 77-3-47 (1972), providing for notice of the commission's hearing such matters as that requested by appellant states that "notice of all such hearings shall be given the persons interested therein by mailing such notice to each public utility which may be affected by any order resulting therefrom and by publication in a newspaper of general circulation published in Jackson, Mississippi." Admittedly, appellee landowners in Walthall County received no notice of the "hearing" before the MPSC, had no actual notice and therefore certainly would not know to appeal any such order within thirty days to the Chancery Court of Hinds County. It does not take a constitutional scholar to find that the requiring of these appellees to appeal an order affecting them and about which they

had absolutely no notice or knowledge, is contrary to the due process requirements of either the state or federal constitutions. See Schroeder v. New York, 371 U.S. 208, 9 L.Ed.2d 255, 83 S.Ct. 279 (1962); and Walker v. Hutchinson, 352 U.S. 112, 1 L.Ed.2d 178, 77 S.Ct. 200 (1956).

The first notice received by appellees was the summons from the Special Court of Eminent Domain brought about by appellant filing its petitions for condemnation.

Before going further, we need to note the provisions of Mississippi Constitution, Article 3, Section 17 (1890), as follows:

> Private property shall not be taken or damages for public use, except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be a judicial question and, as such, determined without regard to legislative assertion that the use is public.

Obviously, in obedience to the above quoted constitutional provision, the legislature in 1971 enacted the hereinbefore set out MCA § 11-27-15 (1972), which affirmatively gave the Special Court of Eminent Domain the power to dismiss the condemnation petitions for certain reasons, particularly, if the court found that there was "no public necessity" for the taking or that the "use alleged to be a public use is not in law a public use for which private property may be taken or damaged."

The MPSC is an arm of the legislature and understandably and properly oversees the actions of the utility companies in order to safeguard the rights of the people of this State. It certainly is commendable to require that the MPSC give its permission to the utility company before the latter proceeds to build its lines. The MPSC however only has jurisdiction within the State of Mississippi in such

matters, and consequently, has the duty to control and regulate "intrastate" utility activities. The ballgame was switched to a different field when appellant filed its condemnation proceedings in the judicial Special Eminent Domain Court. Even though appellant in its request is relying on the previous MPSC order, appellant admits that it is a prerogative of the eminent domain court judge to evaluate facts in deciding whether he should legally dismiss the condemnation proceedings.

As the proceedings have reached judicial proportions, there are certain elemental principles involved. Among them being, as said by this Court in Wise v. Yazoo City, 96 Miss. 507, 51 So. 453 (1910):

> "No power conferred on any corporation, either private or municipal, is to be more strictly construed than the power to exercise the right of eminent domain." . . ."The power of eminent domain being in derogation of the common right, acts conferring it are to be strictly construed, and are not to be extended beyond their plain

> provisions. The right to exercise the power is strictly limited to the purposes specified in the statute conferring it. The proposed use of the lands of the owner must be clearly embraced within the legitimate object of the power conferred. Where there is any doubt in regard to the extent of the power, the landowner must have the benefit of that doubt."

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We need now to look at the facts before the fact finder, Judge Pigott, at the time he sustained appellee's motion to dismiss.

The origination of the high voltage line in Mississippi is shown in the minutes of the operating committee of Middle South Utilities System. Portions of these minutes are as follows:

> The recognition of the necessity of increasing the Middle South System transmission capacity between the south and the north based on the System Planning Committee reports of September 3, 1980 and December 3, 1980, the Operating Committee unanimously adopted the Planning Committee recommendations which are listed as follows:
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> 1. The proper northern termination of a 500 Kv line from the East Orleans Energy Center is the Franklin 500 Kv switchyard of MP&L. Further, the bus at Franklin should not be split.
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> The Operating Committee recognizes that in addition to providing the necessary capability, the major advantage of the eastern route is its geographic separation from the existing Middle South System south-north transmission. The proposed line

minimizes the probability of simultaneous transmission outages caused by natural disasters. Additionally, this route will provide strengthening of the transmission system in the Bogalusa and southern MP&L areas.

Attached to the minutes is the following statement in regard to the line in question:

PURPOSE AND NECESSITY

Middle South System studies have shown the need for a 500 Kv line to the Eastern part of New Orleans. The Franklin EHV Substation was found to be the proper northern terminal of that line. This authorization is for the Miss. Power & Light Company portion of the Franklin - East New Orleans and southern MSU System and will be a part of the transmission needed to distribute power from the East Orleans Energy Center. This line will also provide a source for LP&L's 500/230 KV Substation planned at Bogalusa, LA. This 500/230 KV substation will provide a firm source of power to the South MP&L area, unload the Franklin transformers and the 115 KV transmission from the Franklin EHV Substation, and solves overloading and low voltage problems associated with contingencies in the southern part of MP&L's service area (such as loss of Franklin transformers or loss of Brookhaven-McComb 115 Kv line). The Bogalusa Substation will eliminate the need to increase the transformer capacity at Franklin and to build additional 115 KV

transmission from Franklin to McComb by the late 1980's;

1.	Franklin to LA state line 500 Kv line	$23,650,000	1984
2.	Franklin Line Bay	1,750,000	1984
	TOTAL	$25,400,000	

The eminent domain court judge also had before him the testimony of Frank F. Gallaher, Jr., chief engineer for Appellant, whose testimony briefly explained that the primary purpose of the line was to convey electricity interstate to Louisiana but that it would be "stepped-down" at Bogalusa, Louisiana, and in the event it is needed in the future, it would be re-routed and no doubt re-bought by MP&L through 115 Kv lines now in existence between the two stations and would thereby benefit the counties in appellant's Mississippi territory near Louisiana.

The MPSC by statute admittedly had the duty to protect the interests of the utility and the consumer by holding that the 51 mile high voltage line in question

was intrastate business, even though not one Mississippi consumer will receive electricity directly from the line. The cost of the 51 mile line in the sum of approximately $25,000,000 would be borne by the rate payers of Mississippi. This money paid for the line would then be added to the rate base at the utilities next rate increase request and therefore added to the bills sent Mississippi consumers.

The record does not reveal testimony of any sale agreement to MP&L by its sister company, Middle South Energy, Inc., the owner of Grand Gulf Generating Plant, both of whom are completely owned by Middle South Utilities, Inc. The record does show that by agreement appellant, MP&L, LP&L and NOPSI will buy Middle South Energy's portion of the capacity of energy from the Grand Gulf Plant. The record does not reveal any details regarding the sale by MP&L to LP&L when it does cross the Mississippi/Louisiana line on the 500

Kv line in question. There is no revelation as to the manner or the means of sale of electricity that might return to Mississippi from Louisiana through the Bogalusa substation. We are forced to conclude in this area, the lower court had ample reason to find that any future benefit of the line in question to Mississippi resident rate payers is highly speculative and something that might possibly materialize in the future.

The eminent domain court judge held that the granting of the certificate of public convenience and necessity exceeded the statutory authority and jurisdiction of the Mississippi Public Service Commission and violated constitutional rights provided in Mississippi Constitution Article 3, Section 17. The reasoning for this holding was the language in the opinion to the effect that the primary purpose of the 500 Kv line was to carry electricity interstate from Grand Gulf to Louisiana. The

order of the MPSC stated that it was granting appellant's application "to operate the same for the transmission and distribution of electricity for intrastate sales to and for the public for compensation."

We already have discussed and quoted pertinent parts of Judge Pigott's dismissal order. It should be remembered that appellant made the order of the MPSC a part of its condemnation petitions. We cannot disagree with Judge Pigott that this part of the condemnation proceedings wherein the MPSC granted its permission for "intrastate sales" was not a valid order.

Reiterating -- Judge Pigott was in the seldom occurring situation of being the finder of facts when those facts are disputed or contradictory. We find that under the facts before him, Judge Pigott had ample reasons to find as a fact that "no Mississippi customer would be served off the transmission line in question."

And . . . "the primary stated purpose of the proposed 500 KV line is to transmit electrical energy from Franklin County, Mississippi, to Louisiana Power & Light near Bogalusa, Louisiana, and ultimately to be extended by LP&L to the eastern part of New Orleans, Louisiana. Not one Mississippi customer is to be served by the proposed transmission line."

The trial judge clearly found that the petition should be dismissed pursuant to the requirements of MCA § 11-27-15 (1972), in that there was no public necessity for the taking of the particular property or part thereof. The property was not being taken for "public use" and was not "in law a public use for which private property may be taken or damaged."

Even though Judge Pigott went further and held that MPSC erroneously labeled the line "interstate", the opinion still conforms to the requirements of § 11-27-15. We agree that MPSC was in error in making

the line "intrastate" but we do not think that this holding was necessary for the disposition of the condemnation proceeding as was done by Judge Pigott. We agree with him that the terms "public necessity" and "public use" as set out in the statutes that regulate the duties of the MPSC, contemplate use by the citizens of this state. This is true especially if these citizen rate payers are to pay $23,500,000 for a line and then have that amount added to their future rate base.

We find no error in the dismissal of the order of the Special Court of Eminent Domain and therefore affirm that court's action.

AFFIRMED.

WALKER AND ROY NOBLE LEE, P. JJ., AND HAWKINS, DAN LEE, PRATHER, ROBERTSON, AND SULLIVAN, JJ., CONCUR. PATTERSON, C.J., NOT PARTICIPATING.

APPENDIX G

IN THE SUPREME COURT OF MISSISSIPPI

NO. 55,641

Mississippi Power & Light Company

Plaintiff-Appellant,

v.

Louis A. Conerly, et al

Defendants-Appellees,

January 14, 1985

NOTICE OF APPEAL TO THE SUPREME COURT

OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that Mississippi Power & Light Company, the Appellant above-named, hereby appeals to

the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Mississippi affirming the dismissal of the petition of eminent domain entered in this proceeding on December 12, 1984.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Respectfully submitted,

MISSISSIPPI POWER & LIGHT COMPANY

BY: /s/ Charles T. Ozier
CHARLES T. OZIER
DAVID W. CLARK
F. HALL BAILEY

ATTORNEYS FOR APPELLANT, MISSISSIPPI POWER & LIGHT COMPANY

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OF COUNSEL

CERTIFICATE OF SERVICE

I, the undersigned attorney for the Appellant, do hereby certify that I have this day mailed by United States mail, postage prepaid, a true and correct copy of the above and foregoing Notice of Appeal, to the following:

Hon. Delos Burks
Stewart, Burks & Pace
Stewart Building
111 East Canal Street
Picayune, Mississippi 39466

THIS the 14th day of January, 1985.

/s/ Charles T. Ozier
CHARLES T. OZIER